

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs.

Criminal No. 13-270

ATIBA WARREN,  
Defendant.

Transcript of Sentencing Proceedings on Thursday, August  
25, 2016, United States District Court, Pittsburgh,  
Pennsylvania, before Mark R. Hornak, District Judge.

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript  
produced by computer-aided transcription.

1 (Proceedings held in open court; Thursday, August 25, 2016.)

2 THE COURT: We're here this morning in the case of  
3 the United States of America versus Mr. Atiba Warren, pending  
4 on the docket of the Court at 13-CR- 270.

5 Will counsel for the United States please enter her  
6 appearance.

7 MS. KING: Good morning, Your Honor, Katherine King  
8 for the United States.

9 THE COURT: Good morning, Ms. King.

10 If the counsel for the defendant please enter his  
11 appearance.

12 MR. SCHORR: Damien Schorr on behalf of Mr. Warren.

13 THE COURT: Who is seated with you at counsel table  
14 today?

15 MR. SCHORR: Mr. Warren.

16 THE COURT: He's your client and he's the defendant  
17 in this case.

18 MR. SCHORR: Yes, Your Honor.

19 THE COURT: Mr. Schorr, Ms. King, do either of you  
20 have an objection if we handle today's hearing with everyone  
21 keeping their seated at their seat at counsel table.

22 Ms. King, does that work for you?

23 MS. KING: Yes, Your Honor.

24 THE COURT: Mr. Schorr.

25 MR. SCHORR: Yes, Your Honor.

1 THE COURT: Mr. Warren, as we get started today,  
2 there are a few questions I'm going to go over with you.  
3 Before I do that, I'm going to ask my deputy to administer an  
4 oath.

5 (Administration of the oath.)

6 THE COURT: Mr. Warren, as we get started today  
7 there are a few things I'd like to go over and confirm for the  
8 record, sir.

9 First is, you understand that we're here in federal  
10 court today because this is the hearing at which time the Court  
11 will set the sentence in your case?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Mr. Warren, just to confirm for the  
14 record, you are represented by a lawyer, that lawyer is  
15 Mr. Schorr and he is seated right next to you at that table.

16 Is that correct, sir?

17 THE DEFENDANT: Yes, Your Honor.

18 THE COURT: Have you had enough time and opportunity  
19 to talk about today's case and hearing with Mr. Schorr?

20 MR. WARREN: Yes, Your Honor.

21 THE COURT: Are you satisfied with the job  
22 Mr. Schorr has done for you as your lawyer?

23 THE DEFENDANT: Very much so.

24 THE COURT: Let me ask you this, Mr. Warren. In the  
25 last several weeks, have you treated with or received any type

1 of medical care from a doctor or any other type of health  
2 person?

3 THE DEFENDANT: Yes.

4 THE COURT: Can you briefly describe what that was  
5 for, sir.

6 THE DEFENDANT: Pain management because they don't  
7 want to do the surgery. They have to go back in and then I  
8 don't have a good leg to stand on, they were trying to wait to  
9 see the outcome of the situation. Whatever I get done, I'll do  
10 because the rehabilitation is going to be extensive.

11 THE COURT: Let me ask you this. SO this is for  
12 your hip, sir?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Mr. Warren, let me ask you this. Are  
15 you currently taking any type of prescribed or non-prescribed  
16 medicine?

17 THE DEFENDANT: Yes.

18 THE COURT: Can you tell us what that is.

19 THE DEFENDANT: I'm not sure how to pronounce it.  
20 The highest they could give me where I'm at, it begins with an  
21 M. I'm not absolutely sure. I know it's an anti-inflammatory.  
22 They're not allowed to prescribe pain narcotics or anything  
23 like that, so they give me that, and basically that's it.

24 THE COURT: Let me ask you this, Mr. Warren, since  
25 you have been taking this anti-inflammatory, have you ever

1 noticed that it got in the way of you understanding what is  
2 going on around you?

3 THE DEFENDANT: No. It basically -- it just -- I  
4 guess it helps some, but I don't -- it doesn't cloud my  
5 judgment or anything.

6 THE COURT: You're not having any cloudy judgment or  
7 difficulty this morning?

8 THE DEFENDANT: No.

9 THE COURT: Mr. Warren, lastly, in the last 24 hours  
10 or so, have you had any alcohol or alcoholic beverages?

11 THE DEFENDANT: No, sir.

12 THE COURT: Appreciate that, Mr. Warren.

13 THE DEFENDANT: You're welcome.

14 THE COURT: Mr. Schorr, based on the information  
15 available to you, sir, do you have any doubts as to Mr.  
16 Warren's competence to participate in today's hearing?

17 MR. SCHORR: No, sir.

18 THE COURT: Ms. King, same question of you?

19 MS. KING: No, Your Honor.

20 THE COURT: Mr. Warren, based on your answers to my  
21 questions, my observations here in court, the representations  
22 of your lawyer and the lawyer for the United States, I find you  
23 are competent to participate in today's hearing.

24 Mr. Schorr, and Ms. King, I'm confident you have  
25 carefully reviewed, as has the Court, all the matters that are

1 on the docket that are relevant to today's proceeding.

2 I would like to highlight several of them for the  
3 record.

4 On October 30, 2015, at the conclusion of a trial, a  
5 jury delivered a unanimous verdict of guilty as to Count One of  
6 the indictment in this case, charging a violation of Title 18  
7 of the United States Code, Section 922(g)(1), possession of a  
8 firearm by a convicted felon.

9 Thereafter, the probation department prepared and  
10 made available in the usual course a presentence report on  
11 January 29, 2016. I would note that the United States  
12 Probation Officer Andrew Waszyn is present in the courtroom  
13 today.

14 Thereafter, in a like fashion, the probation  
15 department prepared and made available an addendum to that  
16 presentence report on February 16, 2016.

17 The defendant, through his counsel, initially  
18 Mr. Sindler and predominantly Mr. Schorr have filed a number of  
19 memoranda position statements and other papers relative to  
20 sentencing issues in this case on February 5th, May 11th, July  
21 22nd, July 26th, July 27th, August 22ndm and August 23rd of  
22 2016.

23 Counsel for the government filed similar documents  
24 on February 4th, February 12th, May 2nd, July 22nd, August  
25 14th, and August 23rd, 2016.

1           The Court issued its tentative findings regarding  
2 sentencing matters yesterday, August 24, 2016.

3           Ms. King, have you reviewed each of the documents  
4 and materials to which I have made reference?

5           MS. KING: Yes, Your Honor.

6           THE COURT: Mr. Schorr, have you done likewise and  
7 have you also reviewed them with your client, Mr. Warren?

8           MR. SCHORR: Yes, sir.

9           THE COURT: Mr. Warren, just to confirm for the  
10 record, has your lawyer, Mr. Schorr, reviewed all of those  
11 papers with you and in particular, the presentence report and  
12 the addendum to it?

13          THE DEFENDANT: Yes.

14          THE COURT: Mr. Warren, let me step back from that  
15 question.

16          Ms. King, as I understand it, and Mr. Schorr, I'll  
17 be asking you the same question in a moment, the offense of  
18 conviction in this case, in the circumstances which the Court  
19 has tentatively ruled in its findings and conclusions carries  
20 with it a mandatory minimum sentence of imprisonment of 180  
21 months.

22          Is that correct, Ms. King?

23          MS. KING: Yes, Your Honor.

24          THE COURT: Do you agree with that, Mr. Schorr?

25          MR. SCHORR: Yes, if he qualifies as an armed career

1 criminal.

2 THE COURT: I understand.

3 Mr. Warren, and we're going to go over this in a  
4 little more detail in a few minutes. By statute, that is, by  
5 law passed by Congress and signed into law by the President  
6 some time ago, there's a mandatory minimum term of imprisonment  
7 in your case, the Court has ruled, and we'll hear from counsel  
8 to the extent they want to raise further issues today, but I've  
9 initially ruled that there is a mandatory minimum term of  
10 imprisonment in your case of 15 years, or 180 months.

11 Even though that is in the Court's estimation the  
12 case, I'm still obligated to calculate and consider the  
13 advisory sentencing guidelines that are published by the United  
14 States Sentencing Commission. We're going to talk about that  
15 in a little more in a moment.

16 I would confirm for the record that as to the  
17 sentencing guidelines, the guidelines themselves have been  
18 declared by decisions of the U.S. Supreme Court to be advisory  
19 on the Court. The guidelines themselves are no longer  
20 mandatory and a sentencing court may not presume or take for  
21 granted that an advisory guideline range or a particular  
22 guideline sentence is reasonable or applicable in a given case,  
23 subject to the application of any mandatory statutory  
24 requirement. Therefore, the advisory guidelines themselves are  
25 not only no longer mandatory, they're not presumed to be



1 reasonable in a given case.

2           Ms. King, is there an identifiable victim in this  
3 case for whom notice of today's hearing was required to be  
4 given and if so, has such notice been given?

5           MS. KING: There was no victim, Your Honor.

6           THE COURT: Thank you, Ms. King.

7           I would confirm to counsel and to you, Mr. Warren,  
8 that I've reviewed the complete file and the docket in this  
9 case, that includes but is not limited to the presentence  
10 report, the addendum, each and every paper regarding any  
11 sentencing matter that has been filed by your lawyer,  
12 Mr. Warren, or by Ms. King on behalf of the United States, the  
13 letters that were submitted regarding sentencing matters by  
14 your lawyer, Mr. Schorr, along with the recommendation of the  
15 U.S. Probation Office.

16           I would confirm and order that under Federal Rule of  
17 Criminal Procedure, 32(e)(3), that recommendation is not  
18 disclosed to counsel for the United States, to the defendant,  
19 or to the defendant's lawyer, but I would also confirm for the  
20 record that in determining the sentence in this case, I have  
21 not considered and will not consider any factual or legal  
22 matter that has not been disclosed to all of the lawyers and to  
23 you, Mr. Warren.

24           Mr. Schorr, I note in your sentencing memorandum,  
25 and I've addressed this in the tentative findings that were

1 issued by the Court, you've requested the application and I  
2 have tentatively ruled on the application of two departure  
3 provisions under the now advisory guidelines, specifically, the  
4 provisions contained at Section 5H1.4 and Section 5H1.2 of the  
5 advisory guidelines.

6 Am I correct, Mr. Schorr?

7 MR. SCHORR: Yes, sir.

8 THE COURT: Do you have any other motions for  
9 departure under the sentencing guidelines that the Court should  
10 rule on at today's hearing?

11 MR. SCHORR: No.

12 THE COURT: Ms. King, does the United States have  
13 any motions for a formal departure, as that term is used under  
14 the now advisory sentencing guidelines?

15 MS. KING: No, Your Honor.

16 THE COURT: Ms. King, as we discussed, pursuant to  
17 federal law based on the Court's tentative rulings and the  
18 matters set forth in the presentence report and addendum, the  
19 Court has tentatively ruled that by statute, there's a  
20 mandatory minimum sentence in this case of 15 years.

21 Is that correct?

22 MS. KING: Yes.

23 THE COURT: There are on the record and I've recited  
24 the dates of each of the entries on the docket of the position  
25 statements regarding sentencing matters in this case which

1 principally address the application of the statutory Armed  
2 Career Criminal Act sentencing provisions to Mr. Warren and to  
3 his case. The objection that Mr. Warren, through counsel, had  
4 made to the assessment of criminal history points is set forth  
5 at Paragraph 25 of the presentence report, which the Court has  
6 ruled that those points would not be assessed, along with the  
7 two departures that I have noted and were addressed in the  
8 Court's tentative findings, and what appeared to be an  
9 objection in a sentencing memoranda filed by Mr. Warren's prior  
10 counsel, Mr. Sindler, regarding the recitation of certain  
11 matters in the presentence report regarding Mr. Warren's mental  
12 and emotional health, and I ruled on each of those.

13           At this time, Mr. Schorr, I'll hear from you on any  
14 other matters regarding the calculation of the now advisory  
15 guidelines and the sentencing factors.

16           We'll hear from Ms. King, and neither counsel should  
17 be concerned that the Court is going to call them to task, if  
18 you will, if you address a certain matter more than once.  
19 We'll handle any legal rulings, guideline rulings at this  
20 point. I understand some of those matters may also relate to  
21 issues that would come up in discussion of the general  
22 sentencing factors under 3553(a), no one need be concerned that  
23 if you said -- you can only say it in one place or another. I  
24 recognize there is some overlap and I don't intend to impair  
25 any presentation that either counsel wants to make on the case.

1           So, I thought procedurally, what we would do is hear  
2 from Mr. Schorr and Ms. King on any of the legal matters, if  
3 you will. When that portion of today's proceedings is  
4 concluded, we'll then hear from Mr. Schorr on the 3553(a) and  
5 any other factors he believes the Court should consider  
6 relative to sentencing.

7           When Mr. Schorr tells me he's done with that, I'll  
8 then address Mr. Warren personally and directly and give him an  
9 opportunity to tell the Court anything, literally anything at  
10 all he wants me to know about him, his case, or anything else  
11 that he wants me to be aware of.

12           And then, Ms. King, the floor will be yours, again,  
13 for anything relative to sentencing or sentencing matters the  
14 United States wants to bring to the Court's attention.

15           And then, of course, we'll make sure that both  
16 Ms. King and Mr. Schorr have a final opportunity to tell the  
17 Court anything they think has not yet been addressed.

18           With that, Mr. Schorr, the floor is yours.

19           MR. SCHORR: Before, Your Honor, I start discussing  
20 sentencing factors, I want to ask for one thing so I don't  
21 forget it at the end. This case started out as a state court  
22 case. Mr. Warren was detained by local law enforcement in  
23 Allegheny County for several months before the federal  
24 government picked this case up.

25           Subsequently, it's my understanding that the state

1 court case was dropped, and I'm asking you to put in your  
2 judgment that the time he spent in state custody be applied to  
3 his federal sentence. The Bureau of Prisons has to calculate  
4 that, but they have to know that that state court case was  
5 dropped. Otherwise, they will not credit that time.

6 THE COURT: And was adopted here. You're saying  
7 there is no distinction between the prosecution that started as  
8 a state prosecution, it was fully adopted, which led to our  
9 proceeding here, and then the state charges were dismissed.

10 MR. SCHORR: Right, but he did spend time in state  
11 custody, which has to be applied to his federal sentence. I  
12 want to make sure that is taken care of.

13 THE COURT: Ms. King, does the United States have  
14 any position in those regards?

15 MS. KING: I believe that's up to the Bureau of  
16 Prisons to make that determination, Your Honor. He was not in  
17 consistent custody as well. He made his bond or whatever in  
18 state court and was picked up here federally, so I don't know  
19 how they do that. I have no objection to alerting them to that  
20 fact.

21 THE COURT: Mr. Schorr, at minimum, you want to make  
22 sure that the sentencing judgment alerts the marshal service  
23 and the BOP of those facts so they can fully explore them and  
24 make sure they're considered?

25 MR. SCHORR: Yes. I had asked his previous counsel

1 for information concerning how much time he spent in custody  
2 and he didn't have a chance to get it to me. I didn't get a  
3 chance to go into the state system to find out.

4 THE COURT: Understood.

5 I will put that in the sentencing judgment  
6 affirmatively and directly so that the Bureau of Prisons is  
7 alerted to it.

8 MR. SCHORR: Thank you.

9 Now, as far as the sentencing factors are concerned,  
10 you're also talking about your tentative findings and  
11 conclusions, I can discuss those now.

12 THE COURT: Absolutely.

13 MR. SCHORR: First, I want to object. Concerning  
14 the Maryland robbery conviction, you're applying the wrong  
15 statute. That Maryland statute was not in effect at the time  
16 of his conviction and it's not the same statute. So, I object  
17 on that ground. This analysis is based on the wrong statute.

18 I know you relied on the Moore case from the  
19 District of Columbia, but that's a different case. That  
20 defendant was not convicted in 2002, as I recall. So, my first  
21 objection is the analysis is wrong because it's using the wrong  
22 statute.

23 THE COURT: So which statute do you believe I should  
24 have used?

25 MR. SCHORR: Article 27, Section 486 or 488.

1 THE COURT: Are you sure that's not referencing the  
2 heroin conviction?

3 MR. SCHORR: No, it's from 2002 -- I know Ms. King  
4 gave it to us multiple times. It might be the Maryland  
5 conviction, but it is one of the -- the statute did change.

6 THE COURT: It was codified at the sections that are  
7 recited both in my tentative findings and as reflected in the  
8 Moore case.

9 MR. SCHORR: I understand that. But 486 defines  
10 robbery, and 488, I think, was the enhancement. And I think  
11 the language is different, Your Honor.

12 THE COURT: Ms. King?

13 MS. KING: Yes, Your Honor.

14 I did notice this as well. I don't think that the  
15 Court's findings are inconsistent with the statute, but this is  
16 what I know.

17 The defendant was charged in 2000 under Article 27,  
18 Section 486, 87 and 88, I believe. It was robbery, and then  
19 487 is armed robbery, and 488 I believe tells the prosecution  
20 how to write up the charges.

21 THE COURT: Repeat that again, Article 27, Sections  
22 486 --

23 MS. KING: I think 487 is the one that is the armed  
24 robbery conviction. I have one copy here. I have provided it  
25 at some filing, but I can hand it up to the Court if you like.

1 I'll show Mr. Schorr first.

2 Your Honor, on October 1, 2002, the State of  
3 Maryland repealed all of their -- the majority of their  
4 criminal laws and instituted a new set of criminal laws, which  
5 is the one that the Court cited in its tentative findings,  
6 Maryland Criminal Law Section 3-403. That was in effect as of  
7 October 1, 2002.

8 The defendant pled guilty and was sentenced on  
9 October 7, 2002. I don't know what that does in terms of the  
10 fact that he was originally charged under the old statute, then  
11 pled and sentenced under the new statute, but at the time the  
12 new statute was adopted, it was basically verbatim of what you  
13 have there, Your Honor. The statute that Your Honor cited in  
14 the tentative findings and rulings is the version of the  
15 statute that was amended in 2005. That version --

16 THE COURT: Which, among other things, added  
17 subsection (b) regarding the use of a written instrument  
18 alleging the presence of a dangerous weapon.

19 MS. KING: Yes. So what is cited in Your Honor's  
20 tentative findings, I believe, reads exactly the same as the  
21 statute under which the defendant was convicted, except for the  
22 addition of that ability to commit the crime via presenting a  
23 written instrument.

24 But Your Honor did note in a footnote that  
25 regardless of the addition or not of that section, the crime of



1 committing -- the crime of robbery with a deadly, dangerous  
2 weapon is categorically a crime of violence, which is the  
3 government's position. I believe that that is the correct  
4 analysis. So, the Maryland courts have said in many decisions,  
5 some of which I believe I've cited in some of my sentencing  
6 papers, that when the law was changed in 2002, it was adopted  
7 without change.

8 I did print out, and I can give to Mr. Schorr the  
9 Maryland 2002 session law which did revise and recodify first  
10 repealed Article 27 and then put into place the new law. So, I  
11 have the original article -- I'm sorry, Maryland Criminal Law  
12 Section 3-403, which would have been in place on the day that  
13 he was sentenced, but, again, it's -- as the Court can see,  
14 it's the same language as the Court cited in its tentative  
15 findings, except it did not have the addition of the written  
16 instrument. So I can hand this up if that's at all useful.  
17 But I do believe the Court's recognition that categorically  
18 this is a crime of violence is the correct analysis.

19 MR. SCHORR: I appreciate the government had to go  
20 to extensive efforts to try to find the statute in question.  
21 However, you cannot arrest a man in 2000 and convict him of a  
22 crime that was passed in 2002. You have to look at the offense  
23 as it is worded at the time of the arrest.

24 THE COURT: That means we may not finish the  
25 sentencing hearing today. I understand, Mr. Schorr.

1 MR. SCHORR: Now, I'm objecting from that  
2 standpoint, that we're using the wrong statute.

3 THE COURT: So the statute that was in effect at the  
4 time Mr. Warren was charged by criminal information with three  
5 counts of robbery with a dangerous or deadly weapon was Article  
6 27, Section 487 of the Annotated Code of Maryland, that was in  
7 force at that time, which as Subsection 8 proscribes and  
8 states: A person may not commit or attempt to commit a robbery  
9 under Section 486 of this subheading with a dangerous or deadly  
10 weapon and provides at subsection (b), a person who violates  
11 this section is guilty of a felony and on conviction is subject  
12 to imprisonment not exceeding 20 years.

13 That was the statute in place on the day the actions  
14 that are the basis of the criminal information charging  
15 Mr. Warren in three separate charges was in place.

16 MR. SCHORR: I believe so.

17 MS. KING: Your Honor, if I may, back at the May  
18 hearing, I had introduced those exhibits, so the Court should  
19 have them as exhibits. I'm looking 1, 2, and 6, and I laid out  
20 kind of what Mr. Schorr and I were just discussing relative to  
21 where he was convicted. I think the Court should still have  
22 those probably.

23 THE COURT: Okay. Appreciate that.

24 Mr. Schorr.

25 MR. SCHORR: Now, to that end, you had asked me

1 to -- the Moore case, and in front of the District of Columbia,  
2 which is United States versus Moore, 149 F.Supp.3d 177 (2016),  
3 which I believe was decided in May of this year, the issue  
4 here -- I looked at your tentative findings, I don't really see  
5 where you addressed it, I could be totally wrong. Moore  
6 creates a crime that does not exist. Moore took an enhancement  
7 and made it an element, and nowhere in Apprendi or the Alleyne  
8 case, A-L-L-E-Y-N-E, did I find any authority for a federal  
9 court to have the ability to go in and alter state laws solely  
10 for sentencing purposes. That is what happens here. You're  
11 saying the Moore court said that the use of a dangerous or  
12 deadly weapon is an element and it is not in Maryland law.

13 Now, I cited the Eldridge case in my pleading that I  
14 filed, I think at Document 197 --

15 THE COURT: Wasn't Judge Bates' point that in order  
16 to be convicted, the government, the State of Maryland would  
17 have to prove beyond a reasonable doubt that the actor used a  
18 dangerous or deadly weapon to commit the robbery. There could  
19 be no conviction under the section I cited in my tentative  
20 findings or under 487 unless the state proved beyond a  
21 reasonable doubt that, first, there was either the commission  
22 or attempted commission of a robbery, and that it was with a  
23 dangerous or deadly weapon.

24 MR. SCHORR: That does not make it an element. In  
25 Maryland, the courts have said it's an enhancement. You have

1 to respect Maryland law. The federal courts cannot come in and  
2 say, Maryland courts got this wrong. That is what Judge Bates  
3 did, essentially, what he has done. It is not an element.  
4 When you're looking at whether this is a crime of violence, you  
5 have to look at what are the elements of the crime. And the  
6 elements of the crime of robbery do not have dangerous or  
7 deadly weapon included in them in Maryland and Maryland courts  
8 have not ever treated it that way. It is a sentencing  
9 enhancement.

10           The cynical side of me says that Judge Bates wanted  
11 to reach a certain conclusion and he made sure he got there,  
12 but it is an enhancement, not an element. That is what you  
13 have to look at when deciding whether this is a predicate  
14 offense for the Armed Career Criminal Act.

15           THE COURT: What do you do with the reality that  
16 under 27-487 it is listed as a crime, robbery with a dangerous  
17 or deadly weapon.

18           MR. SCHORR: What does it say?

19           THE COURT: It says a person -- it is entitled  
20 Robbery With Dangerous or Deadly Weapon. A person may not  
21 commit or attempt to commit a robbery under Section 486 of this  
22 subheading with a dangerous or deadly weapon.

23           MR. SCHORR: What does 486 define robbery as?

24           THE COURT: I don't have that in front of me.

25           MR. SCHORR: I don't have it verbatim off the top of

1 my head, but it says it's judicially --

2 THE COURT: Right, it's the common law meaning.

3 MR. SCHORR: You have to look at Maryland courts to  
4 see what they say robbery is. Their definition of robbery is  
5 far broader than the generic definition.

6 THE COURT: This crime, 487, is committing that  
7 robbery with a dangerous or deadly weapon. If you're charged  
8 under 487, you can't be convicted unless there's proof beyond a  
9 reasonable doubt of a dangerous or deadly weapon, correct?

10 MR. SCHORR: My position is 487 is not a crime. 487  
11 is an enhancement. The crime is robbery. The crime is robbery  
12 under Section 486 where the defendant happens to have used a  
13 dangerous or deadly weapon. 487 is not a separate crime and  
14 Maryland courts have said that. You cannot deny that.

15 THE COURT: I'm not admitting or denying anything,  
16 Mr. Schorr.

17 MR. SCHORR: I don't mean to be insolent.

18 THE COURT: You're not being insolent, you are being  
19 interrogating, but that's a different thing.

20 MR. SCHORR: Maryland courts have clearly said it is  
21 not a separate offense. And I know it's hard to wrap your head  
22 around, when you read it, you say give me a break, but that is  
23 what the courts have said.

24 THE COURT: I'm not saying, oh, give me a break.  
25 I'm reading the statute that says a person may not commit or

1 attempt to commit a robbery under Section 486 of this  
2 subheading with a dangerous or deadly weapon. That proscribes  
3 conduct. For instance, it does not read, if any person should  
4 commit a robbery under 486 with a dangerous or deadly weapon,  
5 the sentence is enhanced to X. It proscribes conduct. And  
6 then it says a person who violates this section is guilty of a  
7 felony. Not a person who violates 486 using a deadly weapon,  
8 it says a person who violates this section is guilty of a  
9 felony.

10 MR. SCHORR: That may be how Judge Bates and you are  
11 interpreting it, but can you show me a Maryland case from a  
12 Maryland court that interprets it that way? I don't think you  
13 can because I couldn't find one. I have spent a lot of time  
14 looking at this. There is no Maryland authority for that  
15 position. Maryland courts are the final arbitrator of Maryland  
16 law, not the District of Columbia, not here in the Western  
17 District of Pennsylvania, it's Maryland, what Maryland says,  
18 and Maryland has said this is not a separate crime.

19 THE COURT: Ms. King, what do you say about that?

20 MS. KING: I disagree with that. This is a separate  
21 crime. As the Court was saying, as the Court said in its  
22 tentative findings, a defendant could not be convicted of  
23 robbery with a deadly or dangerous weapon if that particular  
24 fact was not found beyond a reasonable doubt by a jury.

25 THE COURT: Or conceded.

1 MS. KING: Or conceded.

2 After Apprendi, it is clear, and also, that would  
3 increase the maximum penalty by five years. So, it's not just  
4 a sentencing enhancement, it's not as though within a statutory  
5 maximum of ten years your sentence can be enhanced up to ten  
6 years if you have committed this crime with a deadly or  
7 dangerous weapon, it enhances it beyond the statutory maximum  
8 which, according to Apprendi, makes it, therefore, an element.  
9 So this is something that would have to be found by a jury  
10 beyond a reasonable doubt. It makes it a separate crime. So I  
11 just don't see the defendant's point.

12 I have also done a survey of Maryland law and I  
13 cannot find a case, I cannot find a case where someone was  
14 charged with a crime of simple robbery and then at sentencing,  
15 the court enhanced the penalty because the court found that a  
16 dangerous or deadly weapon was used. Because that's not how it  
17 is, you're charged with either simple robbery or you're charged  
18 with the crime of robbery with a deadly and dangerous weapon  
19 and that's how the case proceeds.

20 THE COURT: Certainly post-Apprendi, if a Maryland  
21 state judge, without the consent of the defendant, added to the  
22 maximum sentence based on a judicially found fact that a deadly  
23 or dangerous weapon was used, that would be reversed on  
24 constitutional grounds.

25 MS. KING: Yes, Your Honor, but this case is

1 post-Apprendi. Even pre-Apprendi, I couldn't find such a case.  
2 It just didn't happen in Maryland. The defendant was charged  
3 with whatever the crime was that he committed and was charged  
4 as such in the charging document and that was the case that was  
5 presented to the court. So I looked both pre, obviously,  
6 post-Apprendi that would not usually happen in the usual  
7 course, but this is not a pre-Apprendi case we're talking  
8 about, it's post-Apprendi. So, all the elements of robbery  
9 with a deadly and dangerous weapon had to be either found by a  
10 jury or conceded by the defendant in the court below. Here, he  
11 pleaded guilty to that crime. So, I just don't see the point  
12 that Mr. Schorr is making.

13               Here, in federal court --

14               THE COURT: I think the point he's making -- let me  
15 make sure I understand it.

16               You're saying, Mr. Schorr, that as a matter of law,  
17 a matter of Maryland law, which is binding as a matter of  
18 federal law, there is no crime in Maryland which has as an  
19 element of the crime the use of a dangerous or deadly weapon in  
20 the course of a robbery?

21               MR. SCHORR: That's my position, yes. That's what  
22 Maryland courts have said. I'm not quite sure what date  
23 Apprendi was decided.

24               MS. KING: It was decided in 2000, so at the time  
25 this defendant was convicted, Apprendi applied to him.



1 MR. SCHORR: Convicted.

2 MS. KING: Yes, Apprendi would apply to him because  
3 you wouldn't want it to not apply to him.

4 MR. SCHORR: I disagree. Why are we talking about  
5 Apprendi if he was arrested in 2000? When was Apprendi decided  
6 in 2000, before --

7 MS. KING: That doesn't matter because he was  
8 convicted in 2002. Apprendi is beneficial to the defendant, so  
9 he's not going to waive his Apprendi rights, in my opinion.

10 THE COURT: If he was charged prior to Apprendi, but  
11 at the time of the trial and certainly at sentencing, I think  
12 at least one portion, one consequence of Apprendi is that a  
13 state or federal judge cannot apply -- cannot increase a  
14 sentence based on anything other than a certified judgment of a  
15 prior conviction. That's the one exception as I understand it  
16 to Apprendi. A sentence cannot be increased, the statutory  
17 maximum cannot be increased without proof of the necessary  
18 requirements beyond a reasonable doubt.

19 MR. SCHORR: Your Honor, my understanding when I  
20 read the government's pleading on this one, I forget which one  
21 it was in --

22 MS. KING: I think it was in Document 190.

23 MR. SCHORR: I think they're relying on Apprendi to  
24 say that this creates an element.

25 Am I correct?

1 MS. KING: Yes, and I believe --

2 MR. SCHORR: How can Apprendi -- where is the  
3 authority that says Apprendi can take an a enhancement and turn  
4 it into an element?

5 MS. KING: It's a constitutional right. So the  
6 defendant, even though he's convicted in state court, the  
7 Constitution applies to him, the federal Constitution, that's  
8 how, in my opinion.

9 MR. SCHORR: I don't see how a federal court, under  
10 Apprendi, can take a Maryland statute and say this is no longer  
11 a sentencing enhancement, this is now an element of a crime. I  
12 don't think Apprendi reaches that far. Apprendi is to the  
13 defendant's benefit, but the government is using it to his  
14 detriment. They're saying, oh, no, now, this is an element, so  
15 now he's an armed career criminal. That is the government's --

16 THE COURT: That was, in essence, Judge Bates'  
17 analysis, which was when the government, whether it's the state  
18 government or the federal government, is obligated to prove,  
19 prove a matter beyond a reasonable doubt to bring it within a  
20 statutory proscription, it has become an element of the  
21 offense.

22 MR. SCHORR: Again, we have Maryland saying no. So  
23 I think if there's any uncertainty --

24 THE COURT: What federal case stands for the  
25 proposition that if it is an enhancement, it is not an element

1 of the offense?

2 MR. SCHORR: Well, we've talked about -- I think in  
3 my supplemental objections, I talked about the Descamps case.  
4 Descamps says that a sentencing court can only make a crime of  
5 violence finding on the basis of the elements of the charged  
6 offense.

7 What are the elements of robbery?

8 THE COURT: The charged offense is Section 487. If  
9 one of the things that has to be proven to get a conviction  
10 under 487 is that there was a dangerous -- it was, quote, with  
11 a dangerous or deadly weapon, how is that not an element?  
12 Doesn't that make charging under 487 superfluous?

13 MR. SCHORR: It's not an element because Maryland  
14 courts say it's not an element.

15 THE COURT: No, has Maryland said it's not an  
16 element of the offense of dangerous or deadly weapon?

17 MR. SCHORR: Maryland courts have said that 487 is  
18 not a separate offense, it's an enhancement. That is what they  
19 have said.

20 THE COURT: Okay. Which federal court stands for  
21 the proposition that where a state court says that it is an  
22 enhancement, it cannot and should not be considered an element  
23 of the offense?

24 MR. SCHORR: I haven't found -- well, how about  
25 Johnson where they say we have to respect when the state courts

1 define one of the elements of an offense, we're bound by that.

2 Johnson said that. I believe I cited --

3 THE COURT: Johnson, 2015 Johnson?

4 MR. SCHORR: No, 2010.

5 THE COURT: 2010 Johnson.

6 MR. SCHORR: Also, I believe I provided you some  
7 Third Circuit cases that say the same thing. We have to follow  
8 state court rulings on questions of state law. This is a  
9 question of state law. You cannot in a federal court turn this  
10 enhancement into an element.

11 I've laid it out as clearly as I can. I don't see  
12 where the government has provided you with any authority, and I  
13 don't think Judge Bates really provides any valid authority  
14 where he has -- a federal court has the authority to do that.

15 THE COURT: The "that" is what?

16 MR. SCHORR: To say, okay, well, Maryland treats  
17 this as an enhancement, but for our purposes, we're treating it  
18 as an element. That is what we're talking about here. You  
19 have to respect what the state courts have said.

20 THE COURT: Ms. King?

21 MS. KING: I just disagree with that. I think  
22 Apprendi is clear that any factor that increases the penalty  
23 beyond the statutory maximum is an element that needs to be  
24 proven beyond a reasonable doubt.

25 THE COURT: It plainly has to be proven beyond a

1 reasonable doubt, the question is is it an element?

2 MS. KING: It is an element, Your Honor, because  
3 what else would it be? That's what we have been talking about  
4 since Apprendi. That's what all this Johnson, Mathis,  
5 everything else that has been happening recently all has to do  
6 with elements and what are the elements. So, here, it is  
7 charged as the commission of the crime of robbery with a deadly  
8 and dangerous weapon. They don't just charge it as a robbery  
9 and then later prove that he used a deadly and dangerous  
10 weapon. It's charged as such. So, I think -- while Maryland  
11 law was adopted from the common law, which was robbery, there  
12 was always an increased penalty beyond the maximum that you  
13 could get for robbery, there was always an increased penalty  
14 for committing armed robbery. And so that was -- from what I  
15 can see, it was always charged and always proved that way. And  
16 so, if what you're looking as to what Maryland courts do, that  
17 is what they do, they treat it as an element.

18 MR. SCHORR: No, they treat it as an enhancement.  
19 They say that clearly. I'd like to see the government provide  
20 the Court with a case that clearly states that a federal court  
21 can do what Judge Bates has done. I don't see where they have  
22 the authority to --

23 THE COURT: Other than Judge Bates, that is a whole  
24 big circular.

25 MR. SCHORR: Well, I happen to disagree with him --

1 THE COURT: I understand.

2 MR. SCHORR: -- I am sure he's a fine man, but I  
3 disagree with his reading.

4 THE COURT: Count One charges a violation of Article  
5 27, Section 488.

6 MR. SCHORR: Is that the drug?

7 THE COURT: No. I'm looking at Document 151-1, Page  
8 10 of 12. It's the first of the three criminal informations --  
9 excuse me, the first of the three criminal informations for  
10 robbery is at 151-1, Page 2. Criminal information and Count  
11 One charges a violation of Section 488.

12 Count Two charges a violation of 486, which says  
13 that Mr. Warren did unlawfully rob the aforesaid complainant  
14 and violently did steal from the aforesaid complainant.

15 But Count One charges a violation of 488. It  
16 doesn't charge violation of 486 or 487, it charges 488, which  
17 reads what?

18 Does anybody have that handy?

19 Matt, can you pull that up, Article 27 of the  
20 Maryland Code, Section 488.

21 It doesn't charge a violation of robbery and then  
22 some tag along sentencing enhancement.

23 MR. SCHORR: That's how the courts have treated it,  
24 Your Honor. I'm not worried about indictments, I'm worried  
25 about how the courts have defined the law in Maryland.

1           THE COURT: So, Mr. Schorr, the consequence of your  
2 argument, as I understand it, is the Maryland robbery matters  
3 simply aren't a qualifying conviction and, therefore, the ACCA  
4 doesn't apply?

5           MR. SCHORR: Yes. And it's beyond just because this  
6 is an enhancement. Robbery is a far broader definition. Since  
7 your tentative findings came out, I find cases which support my  
8 position even more. Robbery in Maryland is broadly defined  
9 beyond the generic definition of robbery. I argued that in my  
10 supplemental objection.

11           I'd like to bring your attention -- there's a case  
12 from Maryland's Court of Special Appeals, which is their  
13 intermediate appellant court.

14           THE COURT: It's equivalent to our Pennsylvania  
15 Superior Court.

16           MR. SCHORR: Fetrow, F-E-T-R-O-W, versus Maryland.  
17 It is 847 A.2d, Page 1249. The official reporter was 156 MDAPP  
18 675. It is a 2004 case. In there they talk about robbery and  
19 putting in fear. They say constructive force is also a part of  
20 the spectrum for robbery. You have to have some kind of force.  
21 But they say, actual violence is not required, constructive  
22 violence, which is present through intimidation, is sufficient.

23           Then they also go on to talk about in that case a  
24 Maryland appeals court, which is their Supreme Court case, West  
25 versus State. That cite is 539 A.2d 231, 312 Maryland 197. It

1 is a 1988 case.

2           Now, they talk about -- they discuss force. That's  
3 what we're talking about here because they talk about physical  
4 violence. There has to be physical violence or the threat of  
5 physical violence, of bodily injury under the second Johnson.  
6 They say there, so long as it is sufficient to compel the  
7 victim to part with his property. In other words, sufficient  
8 force must be used to overcome resistance. The mere force that  
9 is required to take possession when there is not resistance is  
10 not enough. They're citing a case called Cooper there.

11           Then they go on to say from two other courts -- from  
12 the Maryland Court of Special Appeals, two other decisions talk  
13 about a case called Williams v. State. The victim testified  
14 that she began screaming from fear when the appellant  
15 approached her and that when the appellant grabbed her  
16 pocketbook, her bag of money and the pocketbook dropped to the  
17 ground, the court held that this was sufficient evidence for  
18 the trier of fact to find that the victim resisted and that her  
19 resistance had been overcome.

20           That's not violent force. That's not physical  
21 force. He grabbed her purse and she screamed. That's a  
22 broader definition than the generic robbery.

23           THE COURT: How is that not physical force?

24           MR. SCHORR: It's not the kind that they talk about  
25 in Johnson, the Supreme Court talked about in the second



1 Johnson decision. They talk about violent physical force. He  
2 grabbed her purse. She dropped it and screamed.

3 Another case they cite, a case called Ratford, where  
4 the appellant grabbed the purse off her shoulder.

5 THE COURT: Let me ask you this, Mr. Schorr. That  
6 line of reasoning only becomes relevant if I conclude you're  
7 correct, that under no circumstances can the requirement for a  
8 conviction under 487 for a dangerous or deadly weapon be viewed  
9 as an element because if that is an element, then the use of  
10 dangerous or deadly weapon categorically makes it a crime of  
11 violence under Johnson.

12 MR. SCHORR: If it is an element, but as I've said  
13 all morning --

14 THE COURT: I understand. But if I find it is an  
15 element for purposes of Alleyne and Descamps and Johnson,  
16 Johnson II, 2015 Johnson, then the fact that there are these  
17 other robbery issues doesn't matter. But if I find that it's  
18 not an element, you're saying it's not a necessary element for  
19 the crime of robbery that there be violent force?

20 MR. SCHORR: Right. Nowhere in the Moore  
21 decision --

22 THE COURT: I'm not saying it's a perfect analogy,  
23 but are you saying in Pennsylvania, aggravated assault is not a  
24 separate offense, it is an enhancement to the crime of assault?

25 MR. SCHORR: I don't know what Pennsylvania courts

1 have ruled on that, Your Honor, so I'm not going to shoot from  
2 the lip there, I just don't know.

3 THE COURT: Okay. So you're saying without getting  
4 into the Giles special appeals dicta from 1970 that says that  
5 burning down someone's barn or one threatening to say that you  
6 engaged in sodomy would be enough for robbery, which were dicta  
7 in both Giles and other cases. You're saying there is a more  
8 recent line of cases that say physical contact, short of  
9 violence as defined by the Supreme Court, in Maryland would  
10 suffice to fulfill the crime of robbery.

11 MR. SCHORR: Yes. And I don't think that the Moore  
12 case gives the Giles and the other cases enough respect. Those  
13 cases were defining -- Maryland courts defining the scope of  
14 robbery.

15 THE COURT: No, because they weren't applied in  
16 those cases. Neither case involved threatening to burn  
17 someone's house down or threatening to go around town saying  
18 they committed sodomy.

19 MR. SCHORR: They are providing guidance on how far  
20 that goes.

21 THE COURT: But it's not -- has either case ever  
22 been cited for anything in Maryland law?

23 MR. SCHORR: I didn't see -- Your Honor, if they  
24 were applicable in this case, I'm sure the government would be  
25 saying we have to follow them.

1 THE COURT: Well, yes. Their point is they're not  
2 applicable, just as --

3 MR. SCHORR: I'm saying they are. Under these  
4 circumstances, it sounds like it's a gray area, you should be  
5 really be ruling for Mr. Warren on this.

6 THE COURT: What principle of law says that?

7 MR. SCHORR: The rule of lenity.

8 THE COURT: The rule of lenity is a lot more precise  
9 than if it's a gray area, it goes in the favor of defendant.  
10 Where there's an ambiguous statute as generally as to the  
11 offense of conviction is when the rule of lenity comes in.

12 MR. SCHORR: I haven't had to argue it for a long  
13 time, but in this case, I mean we have a disagreement as to the  
14 Maryland statute in question. My position is based on Maryland  
15 law.

16 THE COURT: Let me ask you this, Mr. Schorr. The  
17 two cases that you just cited to and read excerpts into the  
18 record -- and I'm asking this question, this is not a gotcha  
19 question, I'm just trying to figure out the lay of the land  
20 here -- those have not been previously cited by you or the  
21 United States in any of the filings in this case?

22 MR. SCHORR: Right. I found these last night.

23 MS. KING: Your Honor, I have cited to Fetrow in my  
24 initial response to the defendant's motion.

25 MR. SCHORR: I just can't keep track of everything.

1 THE COURT: There are a lot here.

2 MS. KING: That was before Mr. Schorr was on the  
3 case, Your Honor. I was responding to Mr. Sindler's  
4 original --

5 THE COURT: His first memo.

6 MS. KING: Yes.

7 THE COURT: Okay, Mr. Schorr, what else do you want  
8 to bring to the Court's attention regarding the robbery issues?  
9 Since I understand your argument, the Court is definitionally  
10 incorrect in its tentative findings in relying and citing to  
11 the Section 302, 304 provisions of the Maryland Code. However,  
12 the language of 487 appears to be functionally the same, but  
13 you're saying whether I read 487 or the statutory provisions  
14 cited in the tentative findings, they are not an element of the  
15 offense of any crime in the State of Maryland because the  
16 Maryland Court of Appeals, Court of Special Appeals, or Supreme  
17 Court of Appeals has said it's not an element. The fact that  
18 it's a matter that has to be proven beyond a reasonable doubt  
19 before it could be applied to any defendant in the courts of  
20 Maryland based on Apprendi, is interesting, according to you,  
21 but not relevant to the Johnson question that is present here?

22 MR. SCHORR: Yes.

23 THE COURT: And that my tentative findings did not  
24 squarely address that. And to the extent that Judge Bates did  
25 in Moore, you've noted your due respect, he's wrong.

1 MR. SCHORR: Yes. I don't think Judge Bates even  
2 discussed the whole Johnson question about what the Maryland  
3 courts say.

4 THE COURT: No, he did, but he came out differently  
5 than your argument.

6 And then you say that, therefore, because it's not  
7 an element, because federal law says I have to apply state law  
8 in making that decision because it's not an element, we're left  
9 with the elements of the crime of robbery as set forth in  
10 Section 486 at the time Mr. Warren was charged in Maryland.  
11 And that even putting Giles and its related case to the side,  
12 there are other authoritative cases of decisional courts of  
13 Maryland that say that to commit and be convicted of a robbery,  
14 one need not either engage in or threaten the level of violence  
15 that the Supreme Court in 2015 Johnson has said is necessary  
16 for the ACCA to apply.

17 Is that, in essence, the outline of your argument?

18 MR. SCHORR: Yes.

19 THE COURT: Appreciate that, Mr. Schorr. We'll come  
20 back to you on other things you want to talk about relative to  
21 the tentative findings.

22 Let me just say this to you, Mr. Schorr, and to you  
23 Ms. King. Even if I think and even if I thought after some  
24 reflection this morning that I know the answer to this, even if  
25 I believe I am legally and morally certain that I know the

1 answer to this sitting here, in fairness to the prosecution and  
2 to Mr. Warren, I'm not just going to orally announce it. We're  
3 going to take a pause in the sentencing hearing and resume it  
4 and I'll issue a definitive written ruling on this point.

5               So, Ms. King --

6               Mr. Schorr, I want to assure you of that, and  
7 Mr. Warren, you of that.

8               And, Ms. King, you of that.

9               So, Ms. King, I'm happy to hear from you on this  
10 segment of the matters, but I recognize that at least as to one  
11 of the cases raised by Mr. Schorr, you, unless you have a  
12 marvelous mental memory bank, you're not going to know it. So,  
13 I recognize you're doing the best you can at this point. But  
14 I'm happy to hear from whatever you'd like to tell me right now  
15 while it's hot and in front of us.

16              MS. KING: Your Honor, I believe I have addressed  
17 this issue extensively in many of my pleadings. I think that  
18 Judge Bates' decision is correct. I'm going to take a look at  
19 those cases again cited by Mr. Schorr, but I just don't think  
20 that his analysis is accurate.

21              THE COURT: Okay. Understood, Ms. King.

22              So, Mr. Schorr, next topic up.

23              Let's see what we don't maybe disagree with.

24              Do you disagree with the Court's conclusion that as  
25 to Paragraph 25 of the presentence report, two criminal history

1 points should not be assessed?

2 MR. SCHORR: That's one of the rare ones I have in  
3 court, Your Honor, I'm not going to argue with you on that one.

4 THE COURT: Ms. King, is the United States, without  
5 waiving any appeal rights, for purposes of this hearing, are  
6 you taking any contrary position as to Paragraph 25?

7 MS. KING: I disagree with you, Your Honor.

8 THE COURT: Understood.

9 So, Mr. Schorr, let's take the next one that is  
10 perhaps less complicated.

11 The Court applied the upward four-level enhancement  
12 or adjustment to the calculation of the advisory guideline  
13 range for the weapon involved having an obliterated serial  
14 number. The reasoning I used was that I am obligated to  
15 accurately do the mathematical calculation of the advisory  
16 guidelines. If that calculation results in an advisory  
17 sentence that is greater than the statutory maximum sentence,  
18 the guidelines themselves say that the guideline sentence  
19 becomes the statutory maximum.

20 Let's take this in segments.

21 MR. SCHORR: Did you reverse that, the guideline  
22 sentence becomes the statutory maximum, or the statutory  
23 maximum --

24 THE COURT: The statutory maximum is the guideline  
25 sentence, they match. At that point, they match.

1           As a legal and factual matter, do you believe that  
2 the enhanced, the four-level upward enhancement for the firearm  
3 having an obliterated serial number should not be part of the  
4 Court's mathematical calculation?

5           MR. SCHORR: Could I have a moment to look at all my  
6 papers, not all of them but the relevant papers?

7           THE COURT: You may.

8           In short, the Court's ruling was I believe it has to  
9 go into the math. What the total math is could be affected if  
10 it bumps up against a statutory maximum.

11          MR. SCHORR: Yes, I think that's what I argued,  
12 didn't I, in my second supplemental objections, yes.

13          THE COURT: But you don't disagree that the evidence  
14 here supports the Court's finding by a fair preponderance of  
15 the evidence that the firearm in question had an obliterated  
16 serial number and that it comes within that four-level  
17 adjustment?

18          MR. SCHORR: I can't argue with that. That's the  
19 language of the guidelines.

20          THE COURT: Understood.

21          And then it was an issue raised by Mr. Sindler, and  
22 I also ruled on it. There was an objection to the inclusion in  
23 the presentence report of the narrative paragraphs related to  
24 Mr. Warren's mental and emotional health. The objection filed  
25 by Mr. Sindler was that that obviously or inherently came from



1 documentation at Cove Forge, which the defendant had not  
2 consented to. The addendum to the presentence report said that  
3 it did not come from that because the defendant did not execute  
4 an authorization and, in fact, was self-reported by the  
5 defendant.

6 Do you have any objection to those paragraphs being  
7 included in the PSR?

8 MR. SCHORR: No, Your Honor. I did not understand  
9 that objection myself.

10 THE COURT: And then that -- before we get to the  
11 two departure motions, I have a feeling you have something to  
12 say about the Maryland drug heroin distribution conviction. Or  
13 you may not.

14 MR. SCHORR: Well, that's been pretty extensively  
15 briefed, Your Honor. It is Mr. Warren's position that if you  
16 look at the certified copy of the document, he's not convicted  
17 of that section that calls for the higher sentence. I rest on  
18 that.

19 THE COURT: Understood.

20 MR. SCHORR: I don't have anything else to say.

21 THE COURT: Understood, sir.

22 So without waiving your position on that as set  
23 forth in your sentencing memoranda, the guts of your argument  
24 today is, Judge, as a facial matter, your tentative findings  
25 are inaccurate because they relate to the section, the section

1 references to the Maryland Code that were not in force at the  
2 time Mr. Warren committed the offenses charged in Maryland as  
3 robbery, that even if I go to Article 27, Section 486, 87 and  
4 88, that as a matter of federal law, applying Maryland law, it  
5 is not an element of a crime of armed robbery, if you will,  
6 robbery with a deadly or dangerous weapon, and therefore --  
7 and, that robbery in itself under Maryland law can be committed  
8 and a conviction could be obtained and sustained without proof  
9 of the level of violence required by the Supreme Court in 2015  
10 Johnson and, therefore, the robbery matters come off the table  
11 as underlying convictions for ACCA purposes?

12 MR. SCHORR: Yes, except I think, Your Honor, I  
13 would say that there is no crime of armed robbery with a  
14 dangerous or deadly weapon in Maryland.

15 THE COURT: Or robbery with a dangerous or deadly  
16 weapon. You're saying that is simply not a statutory offense  
17 in Maryland?

18 MR. SCHORR: Correct, it's an enhancement.

19 THE COURT: More properly stated, was not a  
20 statutory offense in 2000 when Mr. Warren was charged with  
21 those offenses.

22 MR. SCHORR: Correct. And I think also, Your Honor,  
23 the version of the Maryland statute that you relied on in your  
24 tentative findings I think was described as divisible, maybe  
25 not by you, but I think under the previous version, it did not

1 have the disclaimer written instrument language in it, so I  
2 don't think it was a divisible statute at the time.

3 THE COURT: At the time. It is certainly, in the  
4 Court's estimation, is divisible now.

5 MR. SCHORR: Right, because you have separate  
6 elements.

7 THE COURT: So the unsettled matter subject to the  
8 application of the two departures relating to Mr. Warren's  
9 vocational skills and his health situation, that, from your  
10 client's perspective, is a game changer, is what you believe to  
11 be the facial and reasoned inaccuracy of the Court's tentative  
12 findings and rulings on the qualifying offenses related to  
13 armed robbery?

14 MR. SCHORR: Yes, sir.

15 THE COURT: Ms. King, what, if anything, would you  
16 like to say about any or all of that now?

17 MS. KING: Nothing further, Your Honor.

18 THE COURT: I just thought I would check.

19 MS. KING: Thank you.

20 THE COURT: Mr. Schorr, while we're here, let's talk  
21 about the two departures that you've requested.

22 MR. SCHORR: Your Honor, when you look at a  
23 defendant who is going to eventually be released into society,  
24 Mr. Warren can contribute. Under 5H1.2, I recognize, I sort of  
25 turned that guideline on its head when I made this argument,

1 but he should be able to get out in time that he can support  
2 himself and he can work as a plumber, assuming he gets his hips  
3 replaced and everything else is treated. But he's 36 years old  
4 now. By the time he gets out of prison he'll be closer to 50.  
5 Prison life is hard. He'll be physically debilitated. He has  
6 diabetes. So he would be at the mercy of the state and a ward  
7 of the state, basically, in terms of need to be on Public  
8 Assistance. But he can support himself if he gets his health  
9 issues taken care of, so for those reasons a variance, I ask  
10 under 5H1.2, that he's able to take care of himself if he's  
11 back out on the street and medically taken care of.

12 THE COURT: Mr. Schorr, I'm not being picky when I  
13 say this, I'm only -- I am being picky, but not in a  
14 deprecating fashion, at least not intended. You just used the  
15 term "variance." Are you asking me to consider the fact of  
16 Mr. Warren's vocation and training as a plumber as I consider  
17 the 3553(a) factors, or are you asking that I, in essence,  
18 recalculate the advisory guideline range using a departure?

19 MR. SCHORR: I think I'm asking for a variance, Your  
20 Honor.

21 THE COURT: I expressly related in the tentative  
22 findings that we would hear and you were not limited in any  
23 argument under the sentencing factors regarding his vocational  
24 training and skills and its impact that it should have on  
25 sentencing and re-entry into society. So to the extent your

1 sentencing memo asked for, moved for a departure under that  
2 provision, can I treat that as being withdrawn without  
3 prejudice?

4 MR. SCHORR: Yes. Maybe call it a variance instead.

5 THE COURT: I will treat as withdrawn, without  
6 prejudice, any motion for a departure under Section 5H1.2 of  
7 the guidelines without prejudice to the ability of the  
8 defendant or the United States to reference those matters in  
9 application of the sentencing factors.

10 That brings us to 5H1.4 where your sentencing memo  
11 seemed to move for a downward departure, that is, a  
12 recalculation of the advisory guidelines based on Mr. Warren's  
13 physical condition.

14 MR. SCHORR: Let's treat that as a request for a  
15 variance also, Your Honor.

16 THE COURT: So I can treat that motion as withdrawn  
17 without prejudice on the same basis?

18 MR. SCHORR: Yes, sir. In both instances we just  
19 discussed, I'm asking for a variance.

20 THE COURT: Understood.

21 Ms. King, does the United States have any objection  
22 to the Court treating those, to the extent they were motions  
23 for departure, treat them as being withdrawn without prejudice  
24 to the ability of either the United States or the defendant to  
25 make reference to those matters relative to the sentencing

1 factors?

2 MS. KING: No, Your Honor.

3 THE COURT: Without objection, that's what we'll do.

4 We'll do that as a text order treating them in that  
5 way.

6 So then that leaves essentially two items.

7 Mr. Schorr, are you resting on your papers and  
8 arguments previously made regarding the Maryland heroin  
9 distribution matter, at least that's how the Court referenced  
10 it in its tentative findings, and the matters you raised  
11 regarding the robbery?

12 MR. SCHORR: Yes. And on the robbery, what we  
13 discussed today.

14 THE COURT: Understood.

15 That's beyond the papers, it's the matters you  
16 specifically raised today as objections to the Court's  
17 tentative findings.

18 Ms. King, let me ask you this.

19 How do you believe, given the Court's prior  
20 statement, which I'm not changing because it is something I do  
21 think I'm right on, and that is, I'm not going to orally rule  
22 because I want to go back and look at these things, among the  
23 options, it appears to the Court of what we could do, are the  
24 following.

25 I could recess the sentencing hearing, to be

1 reconvened as promptly as is possible on the calendars of  
2 counsel, after the Court has specifically ruled on whether it  
3 is going to amend or modify its tentative findings, and if so,  
4 how. And I think we would do that relatively promptly, I'm not  
5 going to do it today, but we would do it relatively promptly.

6 I was going to say I'm hesitant to suggest this, but  
7 I'm not because this is a vitally important matter, both for  
8 the United States and for Mr. Warren.

9 I recognize there's been a lot of paper, Mr. Schorr  
10 or Ms. King, do you want to file any supplemental document  
11 relative to the issues that were raised in open court today?  
12 There's no wrong answer to that from the Court's perspective.  
13 I literally want to make sure the advocates have the  
14 opportunity they think is the right way to go for the Court  
15 to -- before the Court rules on whether it will modify its  
16 tentative findings.

17 Ms. King, what would you like to do?

18 MS. KING: I don't believe I need to file anything  
19 further, Your Honor.

20 THE COURT: Mr. Schorr, sir?

21 MR. SCHORR: Well, Your Honor, I think what I'd  
22 rather do is after you issue your tentative findings, maybe  
23 file written objections to them. To be quite honest, I was  
24 flying by the seat of my pants when I found these two cases  
25 last night.

1           THE COURT: I understand that, Mr. Schorr. Again,  
2 my observation here isn't critical, but I do think one of the  
3 directions regarding sentencing matters that I'm comfortable is  
4 pretty clear from the Supreme Court and the Third Circuit,  
5 particularly since Molina-Menendez came down from the Supreme  
6 Court in June, April of this year, and then the decision of our  
7 Court of Appeals a year and a half ago, and I apologize, I  
8 don't recall the name of it, that said at the time that any  
9 objection to the procedural reasonableness of the sentence not  
10 made at the sentencing hearing is waived, or would be in the  
11 ordinary course deemed waived. And the reason the Court of  
12 Appeals, one of the reasons they articulated was raise them  
13 while you're in front of a judge so that she or he can fix it.

14           I think if there's something you want to say, it  
15 doesn't mean that Ms. King may not have objections to what my  
16 ultimate rulings are or you might not have objections, but to  
17 the extent there are these objections, we ought to get them  
18 front and center right now and address them. So if that means  
19 you believe you might like to file a supplemental memo, I'm  
20 going to let you do it, just as I would let Ms. King do it.

21           MR. SCHORR: I may do that, Your Honor, within the  
22 next few days.

23           THE COURT: When you say the "next few days," what  
24 do you mean?

25           MR. SCHORR: How about by Tuesday?



1 THE COURT: Well --

2 MR. SCHORR: You want it earlier?

3 THE COURT: I'd like to, if I can.

4 MR. SCHORR: I'll shoot for tomorrow.

5 THE COURT: End of the day tomorrow?

6 MR. SCHORR: Yes.

7 THE COURT: Ms. King, if you change your mind and  
8 there's something you'd like to file by the end of the day  
9 tomorrow, you're welcome to.

10 MS. KING: Thank you, Your Honor.

11 THE COURT: If either of you see in what the other  
12 team filed something that you just believe you are compelled to  
13 put on the record, if you could file it by the end of the day  
14 Monday.

15 Can you live with that, Mr. Schorr?

16 MR. SCHORR: I can live with it, Your Honor.

17 THE COURT: Ms. King, can you live with it?

18 MS. KING: Yes, Your Honor.

19 THE COURT: I know it's not perfect, I was a  
20 practicing lawyer, but if you can live with that -- I know it's  
21 a low bar -- and then I will either -- I will issue something.  
22 It may say I've thought about all this, and I think I was right  
23 in my tentative findings and here's why, or that I was right in  
24 my conclusion, but I need to correct some statements in my  
25 tentative findings, I might do that, or if I believe that

1 there's showing that is different, then I'll address that.

2 We'll go with that.

3           In terms of sentencing factors that would either  
4 change the calculation of the now advisory guidelines or affect  
5 whether or not Mr. Warren, for sentencing purposes, is  
6 considered an armed career criminal, are there any other  
7 matters that need to go on the record now, Mr. Schorr, or have  
8 we now addressed them all, one way or the other?

9           MR. SCHORR: I think we've addressed them all, Your  
10 Honor.

11           THE COURT: That was my thought, but I was checking.

12           Ms. King, same question of you.

13           MS. KING: Your Honor, if the Court -- I do think  
14 that the Court should apply the two points for the 2003 assault  
15 conviction.

16           THE COURT: Understood.

17           MS. KING: I do think that that would change the  
18 ultimate calculation.

19           THE COURT: It does. It changes the Criminal  
20 History Category from V to VI, which results in a different  
21 portion of the sentencing table applying, there's no question.

22           MS. KING: I would just point out that the  
23 government is fully aware and respects the need for counsel at  
24 all points of a proceeding, however, the cases cited by the  
25 Court in its tentative findings relative to the search and

1 inquiry that must be done is really with respect to when the  
2 defendant is actually waiving his right to counsel and does he  
3 understand what he or she is doing and moving forward pro se or  
4 with standby counsel, is the defendant aware of all his rights  
5 and everything else. Here, we have a case where the defendant  
6 was convicted 13 years ago, never challenged that conviction,  
7 to the government's knowledge, and as a result, a presumption  
8 of regularity attaches to that conviction. As the Third  
9 Circuit held in Jones, the defendant has to overcome the burden  
10 of the presumption of regularity and I don't think he's done  
11 that here. It's not the government's burden to prove he didn't  
12 have counsel, he has to overcome the burden that he has, which  
13 is this is a regular conviction and we're going to assume you  
14 had counsel. The time that he was advised that he needed to  
15 get counsel was at a preliminary stage of that case, it was not  
16 at the time that he was convicted and sentenced in that case.  
17 So, I agree that the record is not clear whether he eventually  
18 received counsel or not, however, he was appointed a public  
19 defender in each of his other cases, and there's no reason to  
20 think that this 2003 conviction was anything else.

21           Frankly, he's never even alleged that he didn't have  
22 counsel. He's alleged that he doesn't remember. I did cite  
23 some cases in my response where other Courts in this building,  
24 as well as the Third Circuit, have said that is not sufficient.  
25 While I respect the Court's position, I just need to put my

1 position on the record because it does change the guidelines  
2 dramatically.

3           THE COURT: I understand, Ms. King. And I'll assure  
4 you, Ms. King, and you, Mr. Schorr, and I hope this applies for  
5 as long as I still have this job and each of you have your  
6 jobs, disagreeing with me when the law or facts require you to  
7 disagree with me, from this Court's estimation, is you doing  
8 your job. And I do not take it as any lack of respect or  
9 anything else. In fact, it would be dismaying if either the  
10 United States, through you, Ms. King, Mr. Schorr, or Mr.  
11 Warren, or one of your other clients thought I was off base  
12 legally or factually if you didn't disagree with me.

13           I will say, and this is not meant to be critical to  
14 the courts or the State of Maryland, I did find the records on  
15 this point murky, and that might be a bit charitable. I will  
16 say on the record, that influenced my ruling. I recognize the  
17 presumption of regularity, but under both Curtis and Napolitan,  
18 our Court of Appeals and the Supreme Court have said the one  
19 thing that can be fairly up on the table when this Court, a  
20 federal trial court is considering the implications for  
21 guideline purposes or sentencing purposes of a prior conviction  
22 is whether or not the defendant was represented by counsel or  
23 can be deemed to have fairly and appropriately waived it. It  
24 does seem to the Court that whether -- I know it's not the rule  
25 of lenity, but when the records are as murky as they were here,

1 I believed it was appropriate to -- that that murkiness results  
2 in the points not being assessed. I just did not have the  
3 requisite level of confidence in the regularity of the  
4 proceedings, and there's nothing you can do about it, Ms. King,  
5 or Mr. Schorr, given the passage of time and the distance and  
6 everything else, that I knew that Mr. Warren either had a  
7 lawyer or had knowingly and consciously foregone the right to  
8 have a lawyer at a critical stage of the proceeding.

9           So I understand the position of the United States.  
10 Ms. King, I'll think about it some more, in fairness to the  
11 position, but that really was what was animating my ruling in  
12 that regard, that the records were so murky, and this is such a  
13 central and vital issue, so central and vital that the Supreme  
14 Court and the circuits have said it can be fairly up on the  
15 table for these purposes that I ruled on the way I did. But I  
16 will think about it further in light of the positions both you  
17 and Mr. Schorr have taken.

18           MS. KING: Thank you.

19           MR. SCHORR: I'd like to point out, Your Honor, the  
20 government has repeatedly said Mr. Warren has never said he  
21 didn't have a lawyer. He did say that in Document 191, Page 4:  
22 Warren was not represented by counsel during his 2003 assault  
23 conviction.

24           It's out there now.

25           THE COURT: In fairness, I think what Ms. King was

1 saying, Mr. Warren did speak at the May 10, 2016 hearing and  
2 she did not recall him affirmatively stating, I did not have a  
3 lawyer.

4 MR. SCHORR: Through his lawyer --

5 THE COURT: Is that fair, Ms. King?

6 MS. KING: Yes, Your Honor.

7 MR. SCHORR: Through his lawyer, he's saying it now.

8 THE COURT: I understand that.

9 MR. SCHORR: I think that's all I have at this  
10 point, Your Honor.

11 THE COURT: Mr. Greer, we'll do a text order that  
12 resolves the two motions for departures and confirms the  
13 briefing schedule that we talked about in court today.

14 Mr. Warren, I'm confident based on our interactions  
15 in court that you understand what is happening here, but just  
16 to confirm it, since you're not a lawyer, what I've heard from  
17 your lawyer and the lawyer from the United States are all the  
18 matters that go into calculating what the statutory and  
19 guideline ranges of sentences are in your case. The United  
20 States has taken the position that I should count the two  
21 points for guideline calculation purposes for the assault  
22 conviction that we have been referencing. Your lawyer, in  
23 writing, has reaffirmed today that the Court should not count  
24 for armed career criminal purposes the drug conviction in  
25 Maryland that I've referred to in my documents as the Maryland

1 heroin conviction.

2           We've had both the writings and the arguments today  
3 that your robbery convictions based on your guilty pleas in  
4 Maryland should not count for armed career criminal purposes.

5           Because all of those matters go to the calculation  
6 of what your statutory sentence would be, and the impact of the  
7 calculation of the advisory guidelines, we've addressed them  
8 all today, I'm not ruling on them at this time, I'm going to  
9 consider them. I have given your lawyer and the lawyer for the  
10 United States opportunities to file one more round of papers in  
11 writing in those regards. Once I review those, I will issue  
12 the appropriate findings, and then we will promptly set your  
13 sentencing hearing after that. The intent here is not to  
14 unduly delay things, but the intent of the Court is to make  
15 sure the lawyer for the United States and your lawyer have had  
16 the most complete opportunity to state their positions and then  
17 that my determination is as accurate as I think I can make it.

18           Do you understand that, sir?

19           THE DEFENDANT: Yes, I understand that.

20           THE COURT: Do you have any questions you want to  
21 ask me about the procedure of what we're doing here?

22           THE DEFENDANT: I wanted to confer with my lawyer  
23 for one second.

24           THE COURT: You may.

25           (Pause in the proceedings.)

1 THE COURT: Mr. Warren, anything you'd like to ask  
2 me.

3 THE DEFENDANT: Yes, on advice of my counsel, he  
4 said I should address this myself.

5 THE COURT: Okay.

6 THE DEFENDANT: The 2002 robbery conviction, I was  
7 represented by Marc Zayon out of Baltimore, Maryland, out of  
8 the law offices of Walker and Zayon. I took a plea on this in  
9 the middle of trial under the advisement of my attorney. The  
10 plea's contention of ten years, seven years suspended, three  
11 years probation, once I complete my probation, which was four  
12 years, the robbery convictions would be wiped away. Some kind  
13 of clerical error occurred, and my lawyer takes full  
14 responsibility for it. I had letters and proof that he  
15 contacted the judge and said it was on his behalf that these  
16 convictions are still on my record. I would have never be in  
17 this position, at that time if my lawyer would have did what he  
18 was supposed to do at the time. I never pled to using a weapon  
19 during the course of any robbery. I think that's the point  
20 that was made by Judge Bates in the case that -- out of the  
21 circuit. I would like to say that case is not a precedent  
22 case, it's not binding. And I think that's pretty much it,  
23 Your Honor.

24 THE COURT: Thank you, Mr. Warren.

25 Mr. Schorr, assuming for purposes of these matters



1 here I credit, and I'm not ruling one way or the other, but if  
2 I would credit what Mr. Warren just told me, not about the  
3 legal impact of Moore because that stands on its own, but what  
4 he said happened in those robbery convictions, what, if  
5 anything, do you believe that has to do with the sentencing  
6 issues here?

7 MR. SCHORR: Well, if he pled to simple robbery, he  
8 didn't plead to the enhancement or didn't plead -- he would not  
9 be an armed career criminal.

10 THE COURT: I understand. But I'm bound by the  
11 certified records from the Maryland court, correct?

12 MR. SCHORR: Yes.

13 THE COURT: So, if what Mr. Warren just said is at  
14 variance from those records that are in the docket here, what  
15 impact, if any, does that have on the proceedings in  
16 Mr. Warren's case here?

17 MR. SCHORR: Offhand, I don't know. I don't  
18 think -- we're kind of locked in with what is certified from  
19 the record.

20 THE COURT: That was my understanding under both  
21 Napolitan and Curtis, but I wanted to see if you had any  
22 different thought.

23 MR. SCHORR: He's stuck, basically, which is why  
24 we're fighting so hard on this.

25 THE COURT: Ms. King, same question of you. If I

1 were to credit --

2           And Mr. Warren, when I phrase it that way, I'm not  
3 making a ruling whether I believe you or not.

4           I'm asking if I assume that what you say is true,  
5 what impact, if any, does that have on the sentencing  
6 proceedings in this case?

7           MS. KING: None.

8           THE COURT: Because of Curtis and Napolitan, among  
9 others?

10          MS. KING: Yes, this is not the appropriate forum to  
11 challenge that conviction.

12          THE COURT: Understood.

13          Mr. Schorr, anything else you believe we should take  
14 up today, sir?

15          MR. SCHORR: No, sir.

16          THE COURT: Ms. King, same question of you?

17          MS. KING: No, unless we're going to schedule the  
18 sentencing, Your Honor.

19          THE COURT: Mr. Babik will be in touch with each of  
20 you. We'll make sure that it is a date that does three things;  
21 it's available on the Court's calendar; it's as prompt as is  
22 reasonably possible; and it is also when you, Mr. Schorr and  
23 you Ms. King are available.

24          MS. KING: Thank you.

25          THE COURT: So it will fit all three of those

1 requirements.

2 MR. SCHORR: Thank you, Your Honor.

3 THE COURT: Mr. Babik, is there anything else that  
4 you had notes that we wanted to take up here?

5 MR. BABIK: Nothing else, Judge.

6 THE COURT: Mr. Greer, same question of you?

7 MR. GREER: Nothing, Judge.

8 THE COURT: In a moment, I'll ask Mr. Babik to  
9 adjourn the Court. I'd ask those present in the courtroom to  
10 remain seated and at ease while the marshals assist Mr. Warren.

11 Mr. Schorr, Ms. King, to the extent an error in my  
12 tentative findings made these proceedings more complicated, I  
13 apologize. We'll fix it and get it right. To the extent  
14 they're more complicated for other reasons, I didn't have  
15 anything to do with those, but we are where we are.

16 The marshals can assist Mr. Warren.

17 (Court adjourned.)

18 -----

19 CERTIFICATE

20

21 I, Juliann A. Kienzle, certify that the foregoing is  
22 a correct transcript from the record of proceedings in the  
above-titled matter.

23 s/Juliann A. Kienzle, RMR, CRR

24 \_\_\_\_\_  
25 Juliann A. Kienzle, RMR, CRR